Supreme Court, U.S.
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No. 91-1220

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIAM VIEHWEG,

Petitioner,

V

JOSEPH DEVEREUX

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITIONER'S BRIEF IN REPLY

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court is with jurisdiction to review petitioner's petition for writ of certiorari as concerns a timely filing.

2. Whether the District Court correctly applied Missouri law and observed Petitioner's due process rights in dismissing Petitioner's cause of action for fraud as being time barred.

3. Whether the District Court correctly applied Missouri law and observed Petitioner's due process rights in dismissing Petitioner's fraud action as being "improperly" pled, and then denied his motion to amend.

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No. 91-122?

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PERCEIVED MISSTATEMENTS OF FACT OR LAW

1. Respondent incorrectly states that the "ascertainment of damages" test for statute of limitation purposes is applicable to Petitioner's tort of fraud.

2. Respondent incorrectly states

that the existence of an attorney/client relationship does not affect the tolling of a cause of action for fraud.

3. Respondent incorrectly states that Petitioner did not plead constructive fraud.

4. On page 10, Respondent seems to infer that paragraph 12 of Petitioner's first amended complaint shows this Petitioner's knowledge, at the time of withdrawal, of any alleged fraud upon him by the Respondent. Said paragraph states only that Respondent knew of such matters, not that Petitioner did.

5. Under perceived misstatements of fact or law, Respondent argues that Petitioner's statement, that he initiated this civil action exactly five years after the court of appeals dismissed the underlying action, is incorrect. Respondent changes the subject matter of the Petitioner's statement in order to

invalidate it. The Petitioner's statement, as made, is correct.

6. Under Statement of the Case, Respondent states that the "petitioner moved to file his second amended complaint to add allegations". Such a characterization is less than complete. On January 25, 1991, Respondent filed three motions: to dismiss for failure to state a claim in a short and plain statement or in the alternative to compel separation into counts; to strike averment #37; and to strike multiple averments as being redundant, immaterial, etc. Petitioner responded by moving for leave to file a proposed second amended complaint separating the claim into counts (actually eliminating two); eliminating completely paragraph #37; and further eliminating much of the matter referred to as redundant - all in attempted compliance with Respondent's request.

7. Petitioner has moved to strike the following three statements as irrelevant and not of record: On page 2, middle paragraph, entire sentence beginning with "Subsequent" and ending with "action"; On page 6, entire paragraph designated number two; and on page 9, last paragraph, entire sentence beginning with "Respondent" and ending with "action".

REASONS FOR GRANTING THE WRIT

I.

This Court has jurisdiction to review Petitioner's petition for writ of certiorari in that the petition was timely filed.

Respondent appears to argue that the petition was untimely filed and that Petitioner's application for extension of time to file his petition was unlawfully granted. Actually, the petition is timely unless the granting of said application is

now reversed. The question Respondent is really raising is whether Associate Judge Blackmun abused his discretion in granting Petitioner's said application.

Respondent cites two cases, yet neither case is directly on point. Both cases involve client representation by counsel, not non-attorney pro se's alleging inability to obtain counsel, and both cases involve the initial denial of applications for extensions of time, not the retroactive reversals thereof. Further, though both cite applications that were found to be lacking "good cause shown", what Respondent does not provide in his brief is Justice Scalia's qualifying statement (In MISSISSIPPI v TURNER, ____ U.S. ____, 111 S. CT. 1032 (1991) which reads:

> "In my view, counsel's overextended caseload is not "good cause shown", unless it is

> the result of events unforeseen and uncontrollable by both counsel and client."

That this good faith non-attorney Petitioner was unwillingly pro se certainly raises the question of how much he could have foreseen and controlled, and therefore could support more leniency.

Besides, ninety days from the Appellate Court's judgment of September 24, 1991 was December 23rd. When this Court approved said application on December 17th there were still six days left. Therefore, it can <u>not</u> <u>now</u> be argued that had this Court denied Petitioner's request he could not have responded in time.

For this court to now withdraw its permission would be grossly and patently unfairly prejudicial to Petitioner and would undermine any confidence any future party could have in the validity of this

Court's orders for extensions of time. Petitioner risked subjecting himself to a potentially horrendous last minute effort if his application had been denied. He should not have to risk relying on this Court's order granting such request.

Though Respondent, understandably, may feel the granting was somewhat lenient, and though it may have been, leniency does not raise such granting to the level of abuse of discretion.

Respondent's challenge to this Court's jurisdiction as to a timely filing is less than meritless. Associate Judge Blackmum did not abuse his discretion; the petition is timely; this Court has jurisdiction; and this Petitioner is most grateful.

II

The district court incorrectly applied Missouri law and denied Petitioner his due process rights in dismissing his

cause of action for fraud as being time barred.

It is important to remember here that the only cause of action being reviewed is that for fraud, especially constructive fraud. Though Petitioner's complaint does plead the elements of the tort of intentional breach of fiduciary duty, the lower courts were correct in ruling such tort barred by the statute of limitations. The problems here are derived from both the lower courts and the Respondent confusing the substantially different applications of statute of limitations tests for the two almost identical torts. They cite cases that do not support their findings unless the cases are either partially or completely misread.

The first problem is that the lower courts incorrectly applied the "ascertainment of damages" test (which is applicable to the accrual of the cause of

action for the tort of breach of fiduciary duty) to the tort of fraud, the accrual of which is governed by a different standard, that being the "discovery of the fraud" test. When Petitioner could have ascertained his damages has nothing to do with time limitations as to fraud. An excellent discussion, directly on point, is found in either Albert v Grant Thornton 735 F. Supp 1443,1446-8[1-2] (W.D. Mo 1990) or Schwartz v Lawson 797 S.W.2d 828,832[1,2] (Mo App 1990)

The second problem is that the court incorrectly applied the ruling in ZERO MFG. CO. v HUSCH 743 S.W.2d 439, 441[5] (Mo App 1987) which states only that a cause of action for legal malpractice is not tolled by the existence of a continuing attorney/client relationship. Though such ruling is applicable to a negligent breach of fiduciary duty, it is not applicable to the intentional tort of

fraud. With fraud, the existence of a fiduciary relationship can potentially toll the cause of action. Which brings us to the third problem.

The third problem is that the lower courts incorrectly applied the "should or could have discovered" test to Petitioner's fraud action. The standard discovery test is whether the plaintiff could have or should have discovered using due diligence. But, if the alleged fraud occurs during a fiduciary relationship, that discovery test becomes qualified with the discovery now having to be actual. Petitioner had no duty to double check the "professional" services of Respondent. Vogel v A.G. Edwards & Sons, Inc. 801 S.W.2d 746,754 (MoApp 1990)

Therefore, as Petitioner did allege such a fiduciary relationship, the question is not the duty oriented when he could or should have discovered the fraud,

but rather the fact oriented when he did discover the fraud. Petitioner pled in his complaint that he did not discover the fraud until the fall of 1990 (Petition Appendix page 49, Paragraph 16) So far there have been no pleadings or facts presented in court to the contrary. Petitioner need not have even pled due diligence. Burr v National Life & Acc. Ins. Co. 667 S.W.2d 5,7[6] (MoApp 1984)

The final problem is that the courts incorrectly applied an objective test (decided as a matter of law). Though it is applicable to the ascertainment of damages test for breach of fiduciary duty, and possibly to the could or should have test for discovery of fraud, it is not applicable to the fact question of when Petitioner actually knew of the fraud.

As stated above, the question is when Petitioner actually knew, and he has pled that he didn't until the fall of 1990.

Though it can be inferred that Petitioner suspected negligence on behalf of Respondent during the relationship, negligence is not the intentional tort of fraud. Zero Mfg. Co.v Husch 743 S.W.2d 439,442[8-11] (MoApp 1987) Therefore such inference can not lead to a deduction that Petitioner actually knew of the alleged fraud. Directly on point here is Yeager v Wittels 517 S.W.2d 457,465[10] Therefore the test here is subjective and it is a matter for the jury should it become a contested allegation (as yet, Respondent, who for his defense bears the burden of proof, has not countered Petitioners allegations). The jury must find that Petitioner actually knew of the fraud before the date five years previous to the filing of his complaint, or December 12, 1985. Albert v Grant Thornton 735 F.Supp 1443,1448 (W.D. Mo.1990) Only then will Respondent's defense of statute of

limitations be capable of being granted - legally.

III

The district court incorrectly applied Missouri law in both dismissing Petitioner's fraud action as being "improperly" pled and denying his motion to amend, thereby violating Petitioner's due process rights.

The lower court's rulings do not say that Petitioner failed to plead the elements of fraud, just that he did not plead them properly. And there is more than one kind of fraud.

As to actual fraud, though the elements are there, they may not be very "proper". But because of the facts of this case, Petitioner is not even required to plead actual fraud. White v Mulvania 575 S.W.2d 184,188[7-9] (Mo banc 1978)

As the alleged fraud occurred during

an attorney/client relationship and involves the intentional breach of a fiduciary duty, Petitioner need only plead constructive fraud.

Missouri law has long held that a breach of fiduciary duty is constructive fraud. Gardine v Cotty 230 S.W.2d 731,739[7-9] (Mo banc 1950); Arana v Koerner 735 S.W.2d 729,735[10-13] (MoApp 1987) Case law only requires two elements to be pled: 1) that there was a fiduciary relationship and 2) that a fiduciary duty was intentionally breached. In other words, the elements for constructive fraud are identical as those for intentional breach of fiduciary duty.

And since the lower courts have effectively held that Petitioner did plead the elements for breach of fiduciary duty, he therefore also plead the elements for constructive fraud. No case law requires any further pleading,and neither the lower

court's rulings nor the Respondent has identified any element not pled by Petitioner. The big difference here being that said elements interpreted as an action for breach of fiduciary duty were time barred, but the same elements being considered as an action for constructive fraud, are not.

Missouri has long held that leave to amend be freely given with five and six amendments not being unusual. And certainly no action should be dismissed with prejudice (as was Petitioner's) as long as the plaintiff can possibly correct a default in his pleadings. Petitioner has shown that he was more than willing to correct any form error in his pleadings, and considering that Petitioner is an unwilling pro se, held to a lower standard of pleading, the courts should certainly allow him leave to correct any correctable deficiencies.

A breach of duty which irrespective of moral quilt, the law declares fraudulent because of its tendency to deceive , to violate confidence, or to injure public interest. 37 Corpus Juris Secundum, §2, pages 211-212

Surely this Petitioner's pursuit to hold a court appointed attorney accountable to allegations of constructive fraud are in not only the public's best interest, but also this Court's.

CONCLUSION

The district court misapplied long established Missouri statutory and common law. There is no case law in support of the court's decision. For a federal court to fatally misapply state law is a clear and unquestionable denial of due process. This Petitioner is not asking this Court to make any new constitutional interpretations here, only asking that it apply long established ones.

Petitioner's petition for writ of certiorair should be granted.

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